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10/777,299	02/12/2004	Paul E. Share	13015/39281	5310
62127	7590	05/17/2007	EXAMINER	
VALSPAR SOURCING, INC. 1101 SOUTH THIRD STREET MINNEAPOLIS, MN 55415			DANIELS, MATTHEW J	
		ART UNIT	PAPER NUMBER	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)
	10/777,299	SHARE ET AL.
	Examiner Matthew J. Daniels	Art Unit 1732

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 21 February 2007.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-3,5-21 and 25-32 is/are pending in the application.
 - 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-3,5-21 and 25-32 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____	5) <input type="checkbox"/> Notice of Informal Patent Application
	6) <input type="checkbox"/> Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

1. **Claims 1-3, 5-21, 25, 26, 31 and 32** are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. In Claim 1, the amendment to step (f) does not appear to be supported by the specification. Certain aspects regarding the stability of the preblend are disclosed, but there is no disclosure regarding the stability. Claims 2, 3, 5-21, 25, and 26 are rejected by dependence. In Claim 32, the stability of the container does not appear to be supported by the specification. Certain aspects regarding the stability of the preblend are disclosed, but there is no disclosure regarding the stability. Claim 32 is rejected by dependence.

2. **Claim 20** is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The amendment to Claim 20 presents a new dependency directly to independent

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Claim 1. However, there is no polyethylene terephthalate in Claim 1, and additionally, there are two polyesters in Claim 1 (step (a)(i) and (b)) and it is unclear to which this claim refers.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. **Claims 1-4, 6-15, 17-21, 25-32** are rejected under 35 U.S.C. 103(a) as obvious over Collette (5759653).

As to Claim 1, Collette teach a method comprising the steps of: (a) forming a preblend/masterbatch (col 5 lines 6-7) comprising: a diluent polyester (col 5 line 17), a polyamide material (col 5 line 18), and an oxygen scavenging material (col 5 line 19); providing a base/core layer polyester (col 5 line 31); introducing the preblend and the base polyester into a molding apparatus to permit melting and admixing of the preblend and the base polyester (col 5 lines 29-65); injection molding or extruding the admixture in the apparatus to provide a preform (fig 3, 59); and expanding the preform to provide a plastic container having a barrier layer formed from the admixture of the preblend and polyester (fig 6 & 7), wherein the plastic container and barrier layer has oxygen scavenging property that is activated after filling the container with an aqueous fluid (7:24-33, 7:59-63, 8:46-51). Collette also teaches forming bottles with catalysts that are activated by heat (7:32) and hot fill applications (7:61), which would therefore activate the catalyst during filling.

Collette do not explicitly teach that the container is “stable during unfilled storage”. However, in this regard, Collette suggests that catalysts are activated by oxygen (7:30), heat (7:32), or moisture (7:2-6), and that the stability (shelf life) of the bottles may be improved by refrigeration, desiccation, or storing in a modified atmosphere environment (7:24-28). Thus, although Collette is silent to the stability, Collette teaches storage conditions which would improve the stability of the bottle.

As to Claim 2, Collette teach that the plastic container is a multilayer plastic container (fig 7).

As to Claim 3, Collette suggest that monolayer plastic containers are known and conventional in the prior art (col 1 lines 47-51).

As to Claim 5, Collette teaches the same preblending process, and (see the rejection of Claim 1 above), and thus the preblend would implicitly exhibit the claimed characteristics despite that Collette is silent to comparing the preblend with the claimed hypothetical mixture.

As to Claim 6, Collette et al teach that the preblend is in a form of solid particles (col 5 line 26).

As to Claim 7, Collette et al teach that the diluent polyester is present in the preblend in an amount of about 25% to about 75%, by weight of the preblend (col 16 line 3-7).

As to Claim 8, Collette et al teach that the diluent polyester comprises polyethylene terephthalate and polyethylene naphthalate (col 14 line 22-27).

As to Claim 9, Collette teaches that the base polyester contains a substantial portion virgin PET, which would implicitly be bottle grade (16:12-14). It is noted that Claim 19 of Collette is drawn to “on the order of 50% post consumer PET” (15:15-20). However, the

Examiner's position will be that the additional post consumer PET does not materially affect the basic and novel characteristics of the claimed invention because it provides PET material which would have the same or substantially the same structure as the virgin material.

As to Claim 10, Collette et al teach that the polyamide material is present in the preblend in an amount of about 25% to about 75%, by weight of the preblend (col 15 line 7-11).

As to Claim 11, Collette et al teach that the polyamide material comprises a polymer containing m-xylylenediamine monomer units (col 10 line 51).

As to Claim 12, Collette et al teach that the polyamide material comprises a polymerization product of m-xylylenediamine and adipic acid (col 10 lines 51-52).

As to Claims 13-15, Collette et al teach an oxygen scavenging material present in the preblend in an amount of about 50 to about 1000 parts per million, by weight and comprises cobalt or a metal complex thereof (col 10 lines 24-37).

As to Claim 17, Collette et al teach that the base polyester is in a form of solid particles (col 5 lines 59-67).

As to Claim 18, Collette et al teach that the preblend and the base polyester are admixed in an amount of about 0.5% to about 20%, by weight, of the preblend, and about 80% to about 99.5%, by weight, of the base polyester (col 16 lines 8-11).

As to Claim 19, Collette et al teach that the base polyester is polyethylene terephthalate (col 5 line 31).

As to Claim 20, Collette et al teach that the polyethylene terephthalate comprises a virgin bottle grade polyethylene terephthalate, a post consumer grade polyethylene terephthalate, or a mixture thereof (col 5 lines 11-32).

As to Claim 21, Collette et al teach that the preform contains about 10 to about 80 ppm, by weight, of the oxygen scavenging material (col 1 line 53).

As to Claim 25, Collette teaches that the containers are maintained in refrigeration or desiccation (7:25-28), and hot filling (7:61) or filling with water (8:46-51), which would inherently activate the oxygen scavenging property for those catalysts which activate at room temperature (7:29-30). Alternatively, this aspect of the invention is drawn to a rearrangement of process steps disclosed in the prior art, which is generally deemed to be *prima facie* obvious. In view of Collette's teaching that the scavengers are activated by heat and moisture (), it would have been obvious to activate the scavengers with a hot product (7:61) containing moisture ()

As to Claim 26, Collette's teaching of the claimed process steps and ingredients, when used to form a package, would implicitly meet the claimed result.

As to Claim 27, Collette teach a method comprising the steps of: (a) forming a preblend/masterbatch (col 5 lines 6-7) comprising: a diluent polyester (col 5 line 17), a polyamide material (col 5 line 18), and an oxygen scavenging material (col 5 line 19); providing a virgin grade polyester (col 16, lines 12-14); introducing the preblend and the polyester into a molding apparatus to permit melting and admixing of the preblend and the base polyester (col 5 lines 29-65); injection molding or extruding the admixture in the apparatus to provide a preform (fig 3, 59); and expanding the preform to provide a plastic container having a barrier layer formed from the admixture of the preblend and polyester (fig 6 & 7), wherein the plastic container and barrier layer has oxygen scavenging property that is activated after filling the container with an aqueous fluid (7:24-33, 7:59-63, 8:46-51). Collette also teaches forming

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bottles with catalysts that are activated by heat (7:32) and hot fill applications (7:61), which would therefore activate the catalyst during filling.

Collette does not explicitly teach (a) the admixture consists essentially of the preblend and virgin bottle grade polyester, or (b) the permeability change achieved by the filling with water. However, these aspects of the invention would have been *prima facie* obvious for the following reasons:

- (a) The admixture of Collette contains virgin PET (See Claim 28), but also contains post consumer PET. However, because the material is the same or substantially the same as the remainder of the preblend material, it would not materially affect the basic and novel characteristics of the invention, and thus this transitional language would still read on the method of Collette.
- (b) The claimed process steps and ingredients of Collette, when used to form a package according to Collette's teachings, would implicitly meet the claimed result.

As to Claim 28, Collette et al teach a transition metal oxygen scavenging material present in the preblend in an amount of about 50 to about 1000 parts per million (col. 10, lines 23-37), the polyamide material is present in the preblend in an amount of about 10-50% by weight of the preblend (col 15 line 7-11), and the polyester comprising PET used in a percentage of about 50-90% (col 15, lines 3-4).

As to Claim 29, Collette et al teach a transition metal oxygen scavenging material present in the preblend in an amount of about 50 to about 1000 parts per million (col. 10, lines 23-37), the polyamide material is present in the preblend in an amount of about 10-50% by

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weight of the preblend (col 15 line 7-11), and the polyester comprising PET used in a percentage of about 50-90% (col 15, lines 3-4).

As to Claim 30, the base polyester contains virgin polyethylene terephthalate (col 16, lines 12-14).

As to Claim 31, Collette teach a method comprising the steps of: (a) forming a preblend/masterbatch (col 5 lines 6-7) comprising: a diluent polyester (col 5 line 17), a polyamide material (col 5 line 18), and an oxygen scavenging material (col 5 line 19); providing a base grade polyester (col 15, lines 12-20, col 16, lines 12-14); introducing the preblend and the polyester into a molding apparatus to permit melting and admixing of the preblend and the base polyester (col 5 lines 29-65); injection molding or extruding the admixture in the apparatus to provide a preform (fig 3, **59**); and expanding the preform to provide a plastic container having a barrier layer formed from the admixture of the preblend and polyester (fig 6 & 7), wherein the plastic container and barrier layer has oxygen scavenging property that is activated after filling the container with an aqueous fluid (7:24-33, 7:59-63, 8:46-51). Collette also teaches forming bottles with catalysts that are activated by heat (7:32) and hot fill applications (7:61), which would therefore activate the catalyst during filling. Although Collette does not fabricate a monolayer preform, Collette acknowledges that such teachings are generally available in the prior art (col 1, lines 46-60), and it would have been *prima facie* obvious to provide a monolayer preform in order to provide a single screw extruder (as distinguished from Collette, Fig. 3).

As to Claim 32, Collette et al teach a transition metal oxygen scavenging material present in the preblend in an amount of about 50 to about 1000 parts per million (col. 10, lines 23-37), the polyamide material is present in the preblend in an amount of about 10-50% by

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weight of the preblend (col 15 line 7-11), and the polyester comprising PET used in a percentage of about 50-90% (col 15, lines 3-4).

4. **Claims 31 and 32** are rejected under 35 U.S.C. 103(a) as obvious over Nilsson (USPN 5034252) in view of Collette (5759653). **As to Claim 31**, Nilsson teaches mixing polyethylene terephthalate, polyamide, and an oxygen scavenging material (col 3, lines 29-50), making a monolayer preform by injection molding and expanding it to provide a plastic container (5:1-41). The article of Nilsson would have stability during storage (an aging process is required to cause activation), and would have an oxygen scavenging property activated when filled with aqueous fluid. Nilsson is silent to the preblend process of step (a) and mixing the preblend with the base polyester.

However, Collette teach a method comprising the steps of: (a) forming a preblend/masterbatch (col 5 lines 6-7) comprising: a diluent polyester (col 5 line 17), a polyamide material (col 5 line 18), and an oxygen scavenging material (col 5 line 19); providing a base grade polyester (col 15, lines 12-20, col 16, lines 12-14); introducing the preblend and the polyester into a molding apparatus to permit melting and admixing of the preblend and the base polyester (col 5 lines 29-65); injection molding or extruding the admixture in the apparatus to provide a preform (fig 3, **59**); and expanding the preform to provide a plastic container having a barrier layer formed from the admixture of the preblend and polyester (fig 6 & 7), wherein the plastic container and barrier layer has oxygen scavenging property that is activated after filling the container with an aqueous fluid (7:24-33, 7:59-63, 8:46-51). Collette also teaches forming bottles with catalysts that are activated by heat (7:32) and hot fill applications (7:61), which

would therefore activate the catalyst during filling. It would have been *prima facie* obvious to one of ordinary skill in the art at the time of the invention to incorporate the method of Collette into that of Nilsson in order to provide improved mixing of the constituent materials.

As to Claim 32, Collette et al teach a transition metal oxygen scavenging material present in the preblend in an amount of about 50 to about 1000 parts per million (col. 10, lines 23-37), the polyamide material is present in the preblend in an amount of about 10-50% by weight of the preblend (col 15 line 7-11), and the polyester comprising PET used in a percentage of about 50-90% (col 15, lines 3-4).

Response to Arguments

5. Applicant's arguments filed 21 February 2006 have been fully considered but they are not persuasive. The arguments appear to be on the following grounds:

- a) The oxygen scavenger of Collette is already activated before filling, and Collette takes steps to avoid depletion of the activated scavenging layer.
- b) The Office Action mischaracterizes the teachings of Collette. Collette's section at 6:43 teaches that activation is performed before filling.
- c) The EVOH layer of Collette shields an already activated oxygen scavenging layer.
- d) The post consumer PET of Collette distinguishes the claimed invention.

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6. These arguments are not persuasive for the following reasons:

a-c) The Examiner maintains the positions set forth previously, namely (1) that Collette's process activates by filling with liquids, or (2) that in the alternative, the claimed process is interpreted as a difference in the order of process steps already disclosed by the prior art.

With regard to the first position, Collette teaches (Col. 5) that the materials are dried or preserved from activation of the catalyst (5:15-25). The catalysts may be activated by heat or water, and the containers of Collette are "hot-fill" (7:61). They are protected until the container is filled with a liquid product containing water (8:60-63). The Examiner maintains that this interpretation is valid.

With regard to this second position, even if Applicants' arguments are correct in characterizing the Collette reference, the claimed order of steps may be characterized as a rearrangement of process steps already disclosed by the prior art. Rearrangement of process steps disclosed by the prior art is generally deemed to be *prima facie* obvious in the absence of unexpected results. *Ex parte Rubin*, 128 USPQ 440 (Bd. App. 1959) (Prior art reference disclosing a process of making a laminated sheet wherein a base sheet is first coated with a metallic film and thereafter impregnated with a thermosetting material was held to render *prima facie* obvious claims directed to a process of making a laminated sheet by reversing the order of the prior art process steps.). See also *In re Burhans*, 154 F.2d 690, 69 USPQ 330 (CCPA 1946) (selection of any order of performing process steps is *prima facie* obvious in the absence of new or unexpected results); *In re Gibson*, 39 F.2d 975, 5 USPQ 230 (CCPA 1930) (Selection of any order of mixing ingredients is *prima facie* obvious.). In this case, the activation methods for the materials of Collette were known, namely oxygen, water vapor, or heat (6:44-50). In view of

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Collette's teaching to fill the containers with "hot-fill" products (7:59-61) which contain water (8:48), it is the Examiner's position that one of ordinary skill would have found it obvious to activate the containers with the "hot-fill", water containing products.

d) While the "consisting essentially of" language is noted, the scope of this transitional phrase excludes materials which would materially affect the basic and novel characteristics. Post-consumer PET and virgin PET are both comprised of PET material, and thus it is unclear how its post-consumer or virgin status would materially affect the basic and novel characteristics. It is noted that Collette provides a substantial portion of the material as virgin material (see "first blend", 15:12-20 and 16:12-14), and the "on the order of 50% post consumer PET" (15:15-17) may include very minimal amounts of post consumer PET material and still fall within the disclosed scope of Collette's claim 19.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Matthew J. Daniels whose telephone number is (571) 272-2450. The examiner can normally be reached on Monday - Friday, 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christina Johnson can be reached on (571) 272-1176. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Matthew J. Daniels

A.U. 1732

14 May 2007